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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT T. COLLINS, Defendant and Appellant.	C085063 (Super. Ct. No. 16FE022148)

Defendant Robert T. Collins pled no contest to possession of cocaine for sale and admitted a prior drug conviction. He appeals the trial court's denials of his motions to suppress and to disclose police personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. He also asks us to strike the electronic search condition of his mandatory supervision and to strike his prior drug conviction enhancement as a result of the amendments to Health and Safety Code section 11370.2.

We conclude the court properly denied defendant's suppression and *Pitchess* motions and defendant forfeited his challenge to the electronic search condition by failing to object in the trial court. We agree, however, that the prior drug conviction enhancement must be stricken.

BACKGROUND

The People charged defendant with possession of cocaine for sale and alleged he was previously convicted of two drug-related offenses. Defendant initially pled not guilty and denied the prior conviction allegations. Following the preliminary examination, defendant moved to suppress evidence of any controlled substances found on defendant and "any and all statements made by defendant." The People opposed the motion.

The following facts were adduced at the hearing on defendant's motion to suppress: Around 7:00 p.m. on November 22, 2016, Sacramento County Sheriff's Deputy Jesus Arambula was on patrol in an unmarked, black SUV, driven by Deputy David Feldman. Both deputies were armed and in uniform. They drove into a motel parking lot that had a history of criminal activity; they were looking for "suspicious people, suspicious subject and potential criminals."

Deputy Arambula saw defendant sitting in a parked vehicle; the car was backed into a parking space, raising Arambula's suspicions. Accordingly, Arambula wanted to find out if defendant was in fact a guest at the hotel. Deputy Feldman parked the patrol car 15 to 20 feet from defendant and Arambula got out. Arambula approached defendant on the driver's side of his car, wearing a tactical vest and sheriff's deputy badge; the car window was already down. Arambula asked defendant if he was staying at the motel; defendant said he was not, he was waiting for a friend. Arambula then asked defendant if he was on probation or parole; defendant said he was on probation. Arambula asked defendant to step out of the vehicle; he soon learned defendant was on searchable probation. Deputy Feldman then joined Arambula and together they searched defendant as well as defendant's vehicle.

The trial court found the encounter was consensual and denied defendant's motion.

Defendant then filed a *Pitchess* motion seeking discovery of Sacramento County Sheriff's Deputy Arambula's personnel file. Specifically, defendant sought "[e]vidence of past conduct . . . showing dishonesty or moral turpitude" in order to "impeach Deputy Arambula . . . and . . . further prove that his report and statements at the preliminary hearing were fabricated." Defense counsel argued that complaints of "dishonesty, fabrication of evidence, false reports, false testimony, illegal arrests, unlawful detentions and searches, [and] coercing false confessions . . . ." were admissible to impeach Deputy Arambula. (Capitalization omitted.) And, he averred, such complaints would be material to showing Arambula "fabricated both his police report and testimony in order to create a record that his interaction with [defendant] was consensual."

The court conducted an in camera hearing and questioned the custodian of records for the sheriff's department. The court concluded there was no disclosable evidence responsive to defendant's request. Defendant then filed a renewed motion to suppress before changing his plea.

Pursuant to a negotiated plea, defendant pled no contest to possession of cocaine for sale and admitted his prior drug conviction. In exchange for his plea, the trial court sentenced defendant to a split term, to include three years in county jail and three years on mandatory supervision.

DISCUSSION

I

Motion To Suppress

Defendant contends the trial court erred in denying his motion to suppress because he was detained by Deputy Arambula without "reasonable cause" when Deputy Arambula approached defendant and asked about his probationary status. In support of his contention, defendant argues that "any reasonable person questioned by an armed, uniformed, law officer would have felt he was being detained and not free to leave." We disagree.

"An officer may approach a person in a public place and ask if the person is willing to answer questions. If the person voluntarily answers, those responses, and the officer's observations, are admissible in a criminal prosecution. [Citations.] Such consensual encounters present no constitutional concerns and do not require justification." (*People v. Brown* (2015) 61 Cal.4th 968, 974.)

Deputy Arambula approached defendant while he was sitting in a parked car; he did not demonstrate a show of authority by pulling defendant over or otherwise asking him to stop. (See *People v. Linn* (2015) 241 Cal.App.4th 46, 57 [detention occurs when officer initiates a show of authority].) Deputy Arambula approached defendant alone, leaving his partner in the car, and although he was armed, there is no evidence Deputy Arambula displayed his weapon. (See *Linn*, at p. 58 [presence of several officers or the display of a weapon may indicate a detention].) Nor is there evidence that Deputy Arambula activated his lights or sirens, or prevented defendant from leaving. (See *People v. Perez* (1989) 211 Cal.App.3d 1492, 1495-1496 [no detention when leaving space for suspect to leave and not activating emergency lights].) In sum, Deputy Arambula did not make a show of force or authority that would lead a reasonable person to believe he or she was detained. (See *Linn*, at p. 58 [must look at totality of circumstances to determine whether encounter is consensual or a detention].)

Accordingly, defendant's answer to the inquiry about his parole or probation status was not the product of an unlawful detention and the subsequent search was lawful. (See *People v. Romeo* (2015) 240 Cal.App.4th 931, 939 [probation search lawful without a warrant].) The trial court correctly denied his suppression motion.

II

Pitchess Motion

Defendant further contends the trial court erred by denying his *Pitchess* motion. The People counter that defendant's claim is not cognizable on appeal because he pled no contest. We agree with defendant that his claim is cognizable but find no error.

Defendant's *Pitchess* motion sought evidence to impeach Deputy Arambula's credibility as to whether his encounter with defendant was consensual. To that end, defendant sought evidence of complaints made against Deputy Arambula for "dishonesty, fabrication of evidence, false reports, false testimony, illegal arrests, unlawful detentions and searches, [and] coercing false confessions." (Capitalization omitted.) Defense counsel declared Deputy Arambula's record was material to showing he "fabricated both his police report and testimony in order to create a record that his interaction with [defendant] was consensual."

Accordingly, defendant's *Pitchess* motion was not aimed at proving his innocence of the charged crimes, but at invalidating a search he believed was illegal. Thus, defendant's *Pitchess* motion is intertwined with his suppression motion and may be reviewed on appeal. (See *People v. Collins* (2004) 115 Cal.App.4th 137, 150-151.)

Evidence Code sections 1043 through 1045 and Penal Code sections 832.5, 832.7, and 832.8, codify *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531, which recognized that "a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting law enforcement officer's personnel file that is relevant to the defendant's ability to defend against a criminal charge." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1219, 1226.) " 'The statutory scheme carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to the defense.' " (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220.)

If a defendant seeking to discover an officer's personnel records makes "a showing of good cause, the custodian of records should bring to court all documents 'potentially relevant' to the defendant's motion." (*People v. Mooc*, *supra*, 26 Cal.4th at p. 1226.) "The trial court 'shall examine the information in chambers' [citation], 'out of the presence and hearing of all persons except the person authorized [to possess the records] and such other persons [the custodian of records] is willing to have present.' "

(*Ibid*.; Evid. Code, §§ 915 & 1045, subd. (b).) Thus, "both *Pitchess* and the statutory scheme codifying *Pitchess* require the intervention of a neutral trial judge, who examines the personnel records in camera, away from the eyes of either party, and orders disclosed to the defendant only those records that are found both relevant and otherwise in compliance with statutory limitations." (*Mooc*, at p. 1227.)

We have reviewed the sealed transcript of the in camera hearing in which the trial court questioned the custodian of records under oath regarding Deputy Arambula's personnel records. Based on our review, we conclude the trial court did not abuse its discretion in finding that no disclosable evidence responsive to defendant's request existed.

III

Defendant's Health And Safety Code Section 11370.2 Enhancement Should Be Stricken

Defendant contends the prior drug conviction enhancement he admitted as part of his plea deal should be stricken because of amendments to former Health and Safety Code section 11370.2, subdivision (c) that apply to him.[1] The People concede the issue.

In October 2017 the Governor signed Senate Bill No. 180, which amended section 11370.2 by removing most of the drug offenses that gave rise to a three-year enhancement. (Stats. 2017, ch. 677, § 1.) As of January 1, 2018, only a prior conviction where the defendant used a minor in its commission (§ 11380) gives rise to such an enhancement. (Stats. 2017, ch. 677, § 1.) In defendant's case, his prior drug conviction was not for violation of section 11380.

We agree with the parties that Senate Bill No. 180 applies retroactively. If an amended statute "lessening punishment becomes effective prior to the date the judgment of conviction becomes final then . . . it, and not the old statute in effect when the

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[1] Further undesignated statutory references are to the Health and Safety Code.

prohibited act was committed, applies." (*In re Estrada* (1965) 63 Cal.2d 740, 744; see also *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) And here, the amendment has taken effect and defendant's conviction is not yet final. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306 ["for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed"].)

We will strike defendant's section 11370.2 enhancement.

IV

Electronic Search Condition

Defendant also contends the electronic search condition imposed by the court as a condition of his mandatory supervision is improper under *People v. Lent* (1975) 15 Cal.3d 481. Defendant did not, however, object to the electronic search condition in the trial court on the ground it violated *Lent*. Accordingly, that claim is forfeited. (See *People v. Welch* (1993) 5 Cal.4th 228, 237.)

Defendant further contends the electronic search condition is unconstitutionally overbroad. Challenges to probation conditions ordinarily must be raised in the trial court; if they are not, appellate review of those conditions will be deemed forfeited. (*People v. Welch*, *supra*, 5 Cal.4th at pp. 234-235.) Because defendant did not object to the electronic search condition in the trial court, he has forfeited his ability to challenge both the probation condition's reasonableness and any claim concerning its constitutionality as applied to him. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) However, a defendant who did not object to a probation condition at sentencing may raise a challenge to that condition on appeal if that claim "amount[s] to a 'facial challenge,' " i.e., a challenge that the "phrasing or language . . . is unconstitutionally vague and overbroad," (*id.* at p. 885) that is, a " ' "pure question[ ] of law that can be resolved without reference to the particular sentencing record developed in the trial court" ' " (*id.* at p. 889). Such a claim

"does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts . . . ." (*Id.* at p. 885.)

A review of defendant's overbreadth claim shows that it is not a facial challenge presenting a pure question of law. Appellant argues he "was convicted of possessing cocaine for sale. The record fails to document that [he] has ever used his electronic devices for any criminal purpose or that the present crime related to use of any electronic device." The implication of these arguments is that these circumstances could not support the application of the electronic search conditions. To assess whether such circumstances exist in this case and review defendant's appellate claim, we would have to look at the record, particularly as it relates to defendant's history and the circumstances of this crime. Since the alleged constitutional defect is correctable only by reference to the factual record, it is not a facial constitutional challenge, and the claim it is overbroad has been forfeited by failing to object in the trial court. (*In re I.V.* (2017) 11 Cal.App.5th 249, 260-261; *People v. Kendrick* (2014) 226 Cal.App.4th 769, 777-778.)

To the extent there remains a portion of defendant's claim that is a pure legal question and thus properly raises the claim that the condition is facially overbroad, we reject that contention. In a facial overbreadth challenge to an electronic search condition, the issue is whether the search condition, in the abstract, and not as applied to the particular probationer, is insufficiently narrowly tailored to the state's legitimate interest in reformation and rehabilitation of probationers *in all possible applications*. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 885-889.) The answer here is "no." Electronic search conditions are not categorically invalid. (*In re Ricardo P.* (2019) 7 Cal.5th 1113, 1128.) Thus, although application of this search condition could be constitutionally overbroad as applied to certain probationers, in other circumstances it may be entirely appropriate and constitutional. The criminal offense or defendant's personal history may provide a sufficient basis on which to conclude the condition is a proportional means of deterring future criminality. (*Id.* at pp. 1128-1129.) In those cases, the imposition of such

probation conditions would be constitutional. Because there could be circumstances in which such a condition was appropriate, we reject the claim that the electronic search condition is facially overbroad.

Defendant alternately claims trial counsel rendered ineffective assistance in failing to object to the electronic search condition of mandatory supervision.

" ' "To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." ' " (*People v. Rices* (2017) 4 Cal.5th 49, 80.)

Defendant quotes boilerplate law and makes no argument to demonstrate how trial counsel's failure to object to the electronic search condition of his mandatory supervision was a violation of professional norms. Accordingly, this argument is forfeited as well. (See *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["An appellate court is not required to examine undeveloped claims, nor to make arguments for parties"].)

DISPOSITION

The sentencing enhancement for defendant's prior drug conviction under section 11370.2 is stricken. The judgment is otherwise affirmed.

/s/
Robie, Acting P. J.

We concur:

/s/
Butz, J.

/s/
Murray, J.